No. 78-423

In the Supreme Court of the United States

OCTOBER TERM, 1978

FRED CHEIMAN and NICHOLAS SARDELIS, JR., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 578 F. 2d 160.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 1978, and a petition for rehearing was denied on August 18, 1978. The petition for a writ of certiorari was filed on September 13, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the government may appeal a judgment of acquittal entered after the jury has returned a guilty verdict.

2. Whether the district court improperly deferred ruling on petitioners' motion for a judgment of acquittal.

3. Whether collection of an extension of credit by extortionate means, in violation of 18 U.S.C. 894(a)(1), requires proof of "loansharking" or connection with organized crime.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner Cheiman was convicted on one count and petitioner Sardelis on two counts of attempting to collect an extension of credit by extortionate means, in violation of 18 U.S.C. 894(a)(1).

1. The evidence at trial showed that petitioner Cheiman was part-owner of a drug store, which had incurred operating losses of close to $9,000 between its opening on March 4, 1974, and August 31, 1974. In September 1974 Cheiman hired Arthur Sklar to work as a pharmacist on the understanding that Sklar might later buy a 25% interest in the store for $15,000 to $18,000, if both agreed. In October, Cheiman threatened to fire Sklar if he did not invest in the operation. Two of Sklar's paychecks bounced and Sklar decided not to invest, but he did not tell Cheiman (Tr. 30-36, 213, 219; Pet. App. 5a).

On November 3, 1974, in response to written instructions left by one of Cheiman's partners, Sklar prepared a package of pharmaceuticals for transfer to another of Cheiman's stores and placed the package, worth between $100 and $200, on a shelf beneath the pharmacy counter. That evening Cheiman told Janice Lefton, an employee at the pharmacy, to "[k]eep her eyes opened," which she interpreted to mean that she should watch Sklar. Lefton noticed the package of pharmaceuticals and showed it to Cheiman (Tr. 55-56, 513-514, 570-575).

On November 6, 1974, Cheiman told petitioner Sardelis and another man that he suspected Sklar of stealing from

his store. The three men confronted Sklar with the package of pharmaceuticals in a back room of the store and accused him of stealing $7,000 worth of drugs.[1] Sklar denied the accusation. At that point Sardelis, whom Sklar had never seen before, grabbed Sklar around the neck, pushed him, and tapped him on the shoulder with a baseball bat. Cheiman demanded that Sklar sign a paper previously drafted by Cheiman in which Sklar would admit to having stolen $7,000 worth of drugs and promise to "make full restitution for said sum, either by return of the drugs or full cash payment for same" (Gov't Exh. 1, Tr. 64). When Sklar refused, Sardelis pointed a gun at Sklar's chest and showed Sklar a bullet, saying that it was a soft lead bullet and "that it goes in very small but it comes out real big" (Tr. 59-60, 259-261). Frightened, Sklar signed the note and also made out a check for $7,000, although he told petitioners that he did not have funds to cover the check. Sardelis took $20 to $30, an American Express card, and a driver's license from Sklar's wallet. Sardelis told Sklar that he could help him obtain a mortgage to pay the $7,000 and warned that if he went to the police or did not pay, Sardelis might harm Sklar's family and would prevent Sklar from keeping any job with another pharmacy. Cheiman fired Sklar and told Sklar that if he did not pay within a week he would hear from them (Tr. 58-65, 242-250; Pet. App. 5a-6a).

Thereafter Cheiman spoke to Sklar by phone on several occasions and said that the matter was now out of his hands and had been turned over to "Nick."[2] Cheiman

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[1]After his arrest Cheiman admitted that he had no idea how much Sklar had taken and could not explain how he arrived at the $7,000 figure (Tr. 375-379).

[2]Cheiman also told Sklar that the other investors in the pharmacy wanted to know why they were losing money, and that in response Cheiman had explained that Sklar was a thief. He told Sklar, "I'm off the hook. You're on it" (Pet. App. 6a).

always refused to tell Sklar what Sardelis' surname was (Pet. App. 6a).

On November 12, 1974, Sardelis called Sklar's home and told Sklar's son that Sklar's time was about up. On November 14, Sardelis called again and this time spoke to Sklar's wife. He warned: "You can just tell Art he had better make good on his debts real quick" (*ibid.*).

2. The jury convicted both petitioners of attempting to collect an extension of credit by extortionate means on November 6, 1974, and convicted Sardelis alone of committing the same offense on November 14, 1974.[3]

The district court thereafter set aside the verdicts on the ground (1) that attempts to obtain restitution for a theft are not, as a matter of law, prohibited by 18 U.S.C. 894 and (2) that the evidence of an agreement to pay and of attempts to collect the debt was, in any event, insufficient to support the verdict. The court of appeals reversed. It held that petitioners' conduct was prohibited by 18 U.S.C. 894; the court refused to read into the statute a requirement that petitioners must be loansharks or members of organized crime (Pet. App. 4a, 6a-9a). It also held petitioners' argument attacking the sufficiency of the evidence to be "insubstantial" (Pet. App. 10a n.17).

ARGUMENT

1. Petitioners first contend (Pet. 12-14) that the Double Jeopardy Clause precludes the government's appeal in this case.

The Double Jeopardy Clause is primarily directed at the threat of multiple prosecutions and does not bar government appeals where a new trial or other fact-finding proceedings would not be required if the government prevailed on appeal. *United States* v. *Scott*,

[3]Petitioners were acquitted on the conspiracy count (Pet. App. 17a).

No. 76-1382 (June 14, 1978), slip op. 3, 8 & n.7; *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 569-570 (1977); *United States* v. *Jenkins*, 420 U.S. 358, 365, 370 (1975). Where, as here, "reversal on appeal * * * * merely reinstate[d] the jury's verdict * * *," *United States* v. *Wilson*, 420 U.S. 332, 344-345 (1975), and did not give the prosecution a second opportunity to supply evidence (*Burks* v. *United States*, No. 76-6528 (June 14, 1978), slip op. 16), the Double Jeopardy Clause does not bar the appeal.

The appealability of judgments of acquittal entered after a guilty verdict has been rendered is also uniformly supported by the decisions of the courts of appeals. See, *e.g.*, *United States* v. *Schoenhut*, 576 F. 2d 1010 (3d Cir.), cert. denied, No. 78-13 (Nov. 13, 1978);[4] *United States* v. *Burroughs*, 564 F. 2d 1111, 1117-1119 (4th Cir. 1977); *United States* v. *Ramos*, 558 F. 2d 545, 546 (9th Cir. 1977); *United States* v. *Hemphill*, 544 F. 2d 341, 343 (8th Cir. 1976), cert. denied, 430 U.S. 967 (1977); *United States* v. *Cravero*, 530 F. 2d 666, 670-671 (5th Cir. 1976); *United States* v. *De Garces*, 518 F. 2d 1156, 1159 (2d Cir. 1975).

2. Petitioners moved for a judgment of acquittal on all three counts at the close of the government's case in chief. They now contend (Pet. 14-16) that the district court improperly reserved ruling on this motion until the jury reached its verdict, in violation of Fed. R. Crim. P. 29(a).[5]

[4]Contrary to petitioners' assertion (Pet. 14), this case has not "been docketed for decision" by this Court.

[5]Rule 29(a) provides in relevant part:

> The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses.

But the court did rule on the sufficiency of the evidence to support the substantive counts, denying petitioners' motions as to Counts 2 and 3 (Tr. 451; see also Tr. 444-445). It adopted, for purposes of its ruling, the government's construction of 18 U.S.C. 894, that proof of loansharking or organized crime connections is not required by the statute (discussed in point 3, *infra*).

While the court did reserve a ruling on the correctness of the government's construction of the statute (Tr. 451), petitioners did not object to this delayed ruling on the government's legal theory. They therefore can now complain at most of plain error. And since the court of appeals ultimately determined that the government's construction of the statute was correct, petitioners in fact received a timely ruling applying the correct legal theory. They suffered no injury[6] other than the loss of an unjust ruling in their favor,[7] and they accordingly have no cognizable grievance regarding the reasonable approach adopted by the district court, which comported with that approved by this Court in *Scott, supra* (slip op. 17 n.13) and *United States* v. *Ceccolini*, 435 U.S. 268, 271 (1978).

3. Petitioners concede that 18 U.S.C. 894 "was meant to and does extend coverage beyond the classical loansharking case" (Pet. 17) but argue (Pet. 16-18) that in

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[6]Petitioners claim injury because the government could not have appealed the trial court's decision if the court had decided the legal issue against the government, and entered a judgment of acquittal, at the time of their initial motion. But petitioners' claim amounts only to a complaint that they were denied the benefit of an erroneous ruling of law to which they can hardly claim a legal right.

[7]The court also deferred ruling on the sufficiency of the evidence as to the conspiracy count. But since petitioners were both acquitted on that count, the propriety of the court's action is no longer at issue. Petitioners do not contend that the evidence offered after the reservation of the issue on Count 1 somehow improperly affected the jury's deliberations on the other counts.

this case the court of appeals improperly applied the statute to "the owner of a small business [who] confronts a customer or an employee, whom he believes to be a thief and obtains a confession and [a] promise of restitution from him." The short answer to this contention is that while the statute probably does not apply to the case posited by petitioners, that hypothetical is not this case.

Petitioners did not simply obtain a "confession" and a promise of payment; they used "extortionate means" to attempt to collect from Sklar, including not only verbal threats but also threats with a baseball bat and a gun. This clearly brought petitioners within the statute, which prohibits "knowingly participat[ing] in any way, or conspir[ing] to do so, in the use of any extortionate means (1) to collect or attempt to collect any extension of credit * * *." 18 U.S.C. 894(a). "Extortionate means" is defined as "any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person." 18 U.S.C. 891(7).

Contrary to petitioners' suggestion (Pet. 16-17), the government need not show involvement of organized crime in the transaction. As is the case with the Hobbs Act, 18 U.S.C. 1951, which this Court recently construed in *United States* v. *Culbert*, 435 U.S. 371 (1978), and which also prohibits extortionate transactions, "[n]othing on the face of the statute suggests a congressional intent to limit its coverage to persons who have engaged" in racketeering (*id.* at 373). To the contrary, the statutory language "sweeps within it" (*ibid.*) all persons who have "in any way" participated in the use of any extortionate means to collect an extension of credit. As with the Hobbs Act, the statute here "carefully defines its key terms" (*ibid.*), such as "exten[sion of] credit," "collect[ion of] extension of credit," and "extortionate means." 18 U.S.C. 891(1), (5), (7). Congress has "conveyed its purpose clearly," and there is no need "to limit the

statute's scope by reference to an undefined category of conduct" (*United States* v. *Culbert*, *supra*, 435 U.S. at 379, 380) such as loansharking or organized crime connections.[8]

The legislative history of 18 U.S.C. 894 shows that Congress did not intend to limit the statute to loansharking. An amendment offered by Congressman Poff that would have defined the offense of extortionate collection of loans in terms of loansharking (see 114 Cong. Rec. 1606 (1968)) was adopted by the House (*id.* at 1610), but the reference to loansharking was omitted by the conferees. See H.R. Rep. No. 1397, 90th Cong., 2d Sess. 10 (1968). See also *Perez* v. *United States*, 402 U.S. 146, 149 (1971). And there is no indication that Congress required a showing of connection with "organized crime," whatever that may include.[9] Rather, Congress was well aware that the statute would not be confined to interstate transactions but would permit "prosecution in Federal as well as State courts of a typically State offense." 114 Cong. Rec. 1610 (remarks of Rep. Eckhardt).

The court below therefore was correct in following the other courts that have considered the question and declining to read a requirement of loansharking or connections with organized crime into the statute. See, *e.g.*, *United States* v. *Annerino*, 495 F. 2d 1159, 1164-1165 (7th Cir. 1974); *United States* v. *Bonanno*, 467 F. 2d 14, 16-17 (9th Cir. 1972), cert. denied, 410 U.S. 909 (1973);

[8]As this Court noted in *Culbert*, when the Congress wanted to make racketeering an element of an offense, as in 18 U.S.C. 1961 *et seq.*, it knew how to do so. See 435 U.S. at 378 n.9.

[9]As was the case in *Culbert*, if the courts read in a requirement of loansharking or organized crime connections in the absence of a statutory definition of such language, the result might be a statute whose meaning was so vague as to be constitutionally defective. *United States* v. *Culbert*, *supra*, 435 U.S. at 374.

United States v. *Briola*, 465 F. 2d 1018 (10th Cir. 1972), cert. denied, 409 U.S. 1108 (1973); *United States* v. *Keresty*, 465 F. 2d 36 (3d Cir.), cert. denied, 409 U.S. 991 (1972); cf. *United States* v. *Sears*, 544 F. 2d 585 (2d Cir. 1976).[10]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[10]Petitioners contend (Pet. 18-19) that the court of appeals should not have reversed the trial court's rulings that the government had presented insufficient evidence of an agreement to defer payment and of an attempt to collect the debt by extortionate means.

The court of appeals was correct in rejecting petitioners' arguments as to the strength of the evidence as "insubstantial" (Pet. App. 10a n.17). The statute covers an agreement to defer payment of claims whether the claims are acknowledged or disputed, valid or invalid (18 U.S.C. 891(1)). Here, Sklar and petitioners agreed to defer payment of a claim, and the fact that Sklar disputed the validity of the claim is not material. Similarly, the record clearly shows attempt to collect the debt by "express or implicit threat of use, of violence" (18 U.S.C. 891(7)); threats were made both immediately after Sklar agreed to pay petitioners on November 6 and during subsequent telephone conversations between petitioner Sardelis and Sklar and Sklar's wife.

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